Date: August 22, 1996
Case No.: 95-INA-20

In the Matter of:

HOLLY'S BAKERY,
Employer

On Behalf Of:

FRANCISCO HELO NUNEZ,
Alien

Appearance: Alberto Marrero, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Vittone
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 28, 1993, Holly's Bakery ("Employer") filed an application for labor certification to enable Francisco Helo Nunez ("Alien") to fill the position of Baker (AF 47). The job duties for the position are:

> Cakes: New Chocolate Cake, Cheese Cake, Carrot Cake, German Topping, Swiss Cake, Wite [sic] Cake, Custard. Weigh or measure all diferents [sic] ingredients, mixed and place the mix in a bake tray. Place the tray in oven, giving the time and temperature require [sic]. Decorate the Cake. Ake [sic] diferents [sic] kind of bread.

The requirement for the position is four years of experience in the job offered.

The CO issued a Notice of Findings on January 27, 1994 (AF 37), proposing to deny certification on the grounds that the Employer failed to document the actual minimum requirements in violation of 20 C.F.R. § 656.21(b)(5), in that the Alien did not have the required four years of experience when hired. The CO also proposed denial on the grounds that the Employer's advertisement lacked specificity in that it did not state its specific requirements for the different types of cakes listed in violation of § 656.21(g). The CO additionally denied certification on the grounds that the Employer failed to use a publication deemed most likely to bring response from U.S. workers when it did not advertise in the Los Angeles Times as advised, in violation of § 656.21(f) and (g).

In its rebuttal, dated March 15, 1994 (AF 15), the Employer contended that the Alien has the required four years of experience, first working in Mexico from January 1988 until February

[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

1991, and then in the United States from March 22, 1991, to September 15, 1992. The Employer also contended that one of the recommended newspapers by the local office was the Daily News, and that the Employer used this newspaper because "it has reasonable fares and as it was recommended." The Employer further contended that the advertisement was amended as instructed by the EDD (local office), and that the Employer followed all instructions of the EDD. The Employer also submitted two copies of a translated letter verifying the Alien's employment in Mexico from January 1988 to February 1990 (AF 11-14), a letter from the EDD recommending the Daily News as one of three publication choices (AF 21), a letter verifying the Alien's U.S. employment from March 22, 1991, to September 15, 1992, and a letter with proposed ad corrections by the EDD.

The CO issued the Final Determination on March 17, 1994 (AF 8), denying certification because the Employer has failed to readvertise or adequately document that the Alien has four years of experience.

On April 14, 1994, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(6) provides that "the employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and that the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity. . . ." An employer is not allowed to treat an alien more favorably than it would a U.S. worker. *ERF, Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). An employer violates § 656.21(b)(6) if it hired an alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992).

In the NOF, the CO notified the Employer that the record did not support that the Alien had four years of experience as a baker prior to being hired, and that it could either readvertise with a reduced experience requirement, or present documentation that the Alien gained four years of experience prior to his hire (AF 38-40). The Employer chose not to readvertise, and the evidence presented on rebuttal documents that the Alien worked as a baker in Chihuahua, Mexico, from January 1988 until February 1990 (AF 13), and as a "mixer and baker" in California from March 22, 1991, until September 15, 1992 (AF 27), a total of three and one-half years of experience. The Employer also stated in rebuttal that the Alien worked from January 1988 until March 1991 as a baker in Chihuahua, but offers no documentation to support the

additional time (AF 15).

A bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). Here, the Employer's assertion is contradicted by the evidence presented by the Alien's former employer. We give more weight to the evidence from the former employer, as the former employer's statement is based on its employment records and first-hand knowledge. We give less weight to the statement by the Employer because it is based only on the statements of the Alien. The rebuttal documentation provided by the Employer does not support the contention that the Alien has four years of experience. The CO's denial of labor certification on this issue was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 1996, for the Panel:

_____
Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.